No. 11578.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

REPLY BRIEF FOR PETITIONER.

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Preliminary Statement.

It will be the purpose of petitioner herein to reply to the points in respondent's brief as nearly as possible in the order in which they are therein made.

ARGUMENT.

I.

Petitioner Agrees With Respondent That the Term Resident as Used in Sec. 116(a) Is Defined in Reg. 111, Sec. 29.211-2.

We are pleased to see that at the very beginning of his argument (his page 12) respondent agrees that the test to be employed in administering Section 116(a) of the In-

ternal Revenue Code as amended by the Revenue Act of 1942 [Appendix] are generally those tests employed in determining whether an alien is a resident of the United States, namely, Section 29.211-2 of Treasury Regulations 111 [see Appendix].

There can be no doubt that this was the intention of Congress for in the 1942 Senate amendment to Sec. 116(a), I. R. C., accepted by Conference Committee of Senate and House, this identical language was employed, namely, that "the tests as to whether a taxpayer is a resident of a foreign country or countries will be those generally applicable in ascertaining whether an alien is a resident of the United States."

It is indeed fortunate that we have this clarification of the meaning of the word "resident" as used in this taxing statute for the term certainly has many and varied meanings as noted in *Commissioner of Internal Revenue v. Swent,* 155 F. (2d) 513, cited by both petitioner and respondent.

And even in our Federal tax statutes the term resident is used with wide and different meanings, as noted in *Bowring v. Bowers,* 24 F. (2d) 918, cited by respondent at his page 23:

> "The U. S. Income Tax Acts from the Act of 1913 on, have been uniform in levying a tax on the entire income of aliens, if resident here, and residence has been construed by the Commissioner in all his ruling as something which may be less than a domicile, which fixes the law of devolution of property and determines the incidence of estate and succession taxes. It is true that 'residence' is ordinarily used as the equivalent of domicile in statutes relating to probate, administration and succession taxes. So, as might be ex-

pected, in the Revenue Acts, the word 'residence' when employed in the portions of the Act dealing with the Estate Tax law, means 'domiciled' and has been so construed by the practice and regulations of the Department."

It is rather amusing to find respondent stressing the point at the end of (I) of his brief that exemptions are a matter of legislative grace, for under subhead (A) of (I) we find him liberal to the point of laxity in the administration of what he so fondly refers to as the "foreign trade exemption." We do not question the principle that the law as to exemptions should be strictly construed but we submit that the balanced scale of justice should not be too heavily handicapped by the mind of the Commissioner as he swings from his administration of the "foreign trade exemption" to what he might well call the "technician" or "Senator George" amendment, effective in 1943. More as to this in subheads A and B of this brief.

A. Sec. 116(a) I. R. C. as Amended in 1926 Granting Exemption to a Bona Fide Non-resident of the United States During More Than Six Months of a Taxable Year Was Administered as Though the Words Bona Fide Were Missing and Non-resident Meant Absentee.

Respondent omitted the following interesting language from his citation of *Carstairs v. United States,* 17 A. F. T. R. 1044 (page 17, his brief):

"If, as defendant contends, the Committee Report shows that this clause was inserted in relief of salesmen and foreign representatives of American firms, traveling abroad solely for the purposes of their business, it is difficult to see why the statute did not say so, instead of carefully specifying *'bona fide'* non-resi-

> dents, thus excluding by omission residents of this country abroad for a specific and temporary purpose and accomplishing a result the opposite of that which defendant says was intended."

In petitioner's opening brief at page 12, we cited *Commissioner of Internal Revenue v. Fiske's Estate,* 128 F. (2d) 487, where the Court said, in part:

> "In construing the phrase 'bona fide nonresident of the United States for more than six months during the taxable year,' the Bureau of Internal Revenue has interpreted it as applying to any American citizen actually outside the United States for more than six months during the taxable year, and this construction finds support in the legislative history of the act."

It was apparently this lack of any attention paid to the question of *"bona fide"* non-residence that led the Senate Committee on Finance, C. B. 1942, pages 548, 549, to report:

> ". . . This provision of the present law has suffered considerable abuse, in the case of persons absenting themselves from the United States for more than six months simply for tax-evasion purposes."

It will be noted that the Court above said that the Bureau of Internal Revenue had interpreted the phrase *"bona fide* non-resident" as applying to any American citizen actually outside the United States for more than six months during the taxable year. Apparently there was no effort on the part of respondent to tax those persons whom the Senate Committee say absented themselves from the United States for tax-evasion purposes. Respondent apparently did not then feel, as he asserts now, that the exemption granted by Sec. 116(a) is a matter of legislative grace.

Nothing better illustrates the kind of legislative and administrative shell and pea game that respondent would invoke, than the treatment of taxpayer in the case at bar.

Michael Downs is exempted from his overseas income tax for the last half of 1942 on the grounds that he was then a *bona fide* non-resident of the United States. But one instant after midnight, December 31, 1942, respondent would say of him, as he does at page 29 of his Brief:

> "We think he is one of that class of persons, 'technicians, American citizens who are merely temporarily away from home,' who, Senator George at the Senate Hearings on the amendment, *supra,* stated, should be reached and properly dealt with for taxation purposes."

B. The Test to be Applied Under Section 116(a) as Amended by Section 148 of the Revenue Act of 1942 Is Generally the Test for Ascertaining Whether an Alien Is a Resident of the United States.

The above caption is the same as that used in heading (B) of his Brief. And we agree with respondent when he states at page 25 of his Brief that the most important tests applied in determining whether an alien is a resident of the United States are set forth in Sec. 29.211-2 of Regulations 111 [Appendix]. But we call this Court's attention to the fact that respondent is not warranted in repeatedly readings into this law by juxta position the remarks of Senator George at a hearing of the Senate Finance Committee when he was aiming to shorten the testimony of a witness before the Committee (page 19 of respondent's brief). These remarks are certainly not a part of the law and not remotely made so. They are offensive and unfair and made most untimely.

These remarks were untimely because at the very time they were made our country desparately needed these technical men overseas. As set forth in petitioner's statement of facts his opening Brief, these 3,000 Lockheed men were the pick of the mechanical and technical genius of our country, recruited from engine factories and watch plants all over the United States, but mainly from airplane factories on the Pacific Coast.

General (Hap) Arnold needed the men quickly and badly and telegraphed to practically all manufacturers in the United States to release such personnel as Lockheed Overseas Corporation needed.

The Germans were far ahead of us in airplane development. We were just beginning. They had had combat experience. We none. We needed skilled men, many of them, near the scene of action to modify our planes as our young fliers proved we needed such. Hap Arnold did not have the time or equipment to train new recruits to develop the needed modification organization. So Lockheed was assigned this big and most important task. These technicians were men who had had months and often years of the needed training. If Sec. 116(a) as it stood through 1942 was intended as respondent says with approval at page 14 of his brief, "to stimulate foreign trade by giving to salesmen and traders the same tax advantage provided by other countries;" then why does he twist the law against these technicians who did so much to save this same American trade (and ourselves as we have already said).

The Tax Court decisions cited at top of page 24 of respondent's Brief merely are in line with the decision here on appeal and its companion case herein, that of *J. Gerber Hoofnel v. Commissioner,* No. 11593, in this Court.

II.

The Evidence Supports Petitioner's Claim That He Was a Bona Fide Resident of Great Britain and North Ireland During the Taxable Year Within the Meaning of Sec. 116(a), I. R. C., as Defined by Regulations 111, Sec. 29.211-2.

Sec. 29.211-2, *supra,* reads as follows:

> "An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances."

Respondent Commissioner of Internal Revenue, and the Tax Court agree that the above Section applies in reverse

to a citizen of the United States abroad for the entire taxable year. So applying it we submit [R. 82-85]:

Downs was not a mere transient or sojourner in Great Britain and North Ireland. He went there under contract with Lockheed Overseas Corporation to stay for the duration of the war and such additional time as necessary for Lockheed to perform its contract with the Army. Neither he nor anyone else knew in 1943 how long this might be or whether he would ever return. He could not for this reason have any intention with regard to the length and nature of his stay. He agreed in his contract to go wherever the Army and Lockheed might send him. He had a mere floating intention, indefinite as to time, to return to the United States which, as the definition says, was not sufficient to make him a transient. He lived in Great Britain and North Ireland and had no definite intention as to his stay (and could have no definite intention as to his stay during the war condition of 1943) and this the definition says made him a resident.

He did not go to Great Britain and Ireland for a definite purpose which in its nature might be promptly accomplished; but his purpose was of such a nature that an extended stay might be necessary for its accomplishment, and to that end he made his home *temporarily* over there; he therefore became a resident, though it was his intention at all times to return to his domicile in the United States when the purpose for which he went overseas had been consummated or abandoned.

The above is an accurate and full paraphrase of Sec. 29.211-2 as it relates to Michael Downs.

Nowhere in the record is there any evidence to justify respondent in alleging as he does, at the top of page 26 of his Brief, that Downs went to the British Isles and North Ireland for only one purpose—to make money by carrying out his contract with his employer.

We submit that what we have said heretofore herein and what we have said in our opening brief sufficiently answers page 26 and any following pages of respondent's Brief.

Conclusion.

The decision of the Tax should be reversed.

Respectfully submitted,

ROBERT A. WARING,
Attorney for Petitioner.

September 3, 1947.

table to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * * * * * * *

(26 U. S. C. 1940 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116-1.[6] *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a *bona fide* resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption

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[6]This section was amended by T. D. 5373, 1944 Cum. Bull. 143, in respects not material to the instant case.

for such taxable year. However, once *bona fide* residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a *bona fide* resident of a foreign country. Whether the individual citizen of the United States is a *bona fide* resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * * * * * * *

SEC. 29.211-2. Definition.—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States;

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident,

though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * * * * * * *

SEC. 29.211-4. *Proof of Residence of Alien.*—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a non-resident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or show-

ing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211-5. *Loss of Residence by Alien.*—An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.